

1 Department of Labor and Industry  
2 Board of Personnel Appeals  
3 PO Box 201503  
4 Helena, MT 59620-1503  
5 (406) 444-2718  
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8 STATE OF MONTANA  
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10  
11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 11-2011

12	ARLEE CLASSIFIED EMPLOYEES	)	
13	ASSOCIATION, MEA-MFT,	)	
14	Complainant,	)	
15	-vs-	)	INVESTIGATIVE REPORT
16		)	AND
17		)	NOTICE OF INTENT TO DISMISS
18	ARLEE JOINT ELEMENTARY AND HIGH	)	
19	SCHOOL DISTRICT NO. 8,	)	
20	Defendant,	)	
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24 **I. Introduction**

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26 On November 17, 2010, the Arlee Classified Employees Association, MEA-MFT,  
27 hereinafter ACEA or Association, filed an unfair labor practice charge with the Board of  
28 Personnel Appeals alleging that the Arlee Joint Elementary and High School District No.  
29 8, hereinafter the District, committed an unfair labor practice "by failing to increase the  
30 amount of its monthly contribution for health insurance for classified staff in the amount  
31 of the increased contribution for certified staff". A violation of 39-31-401 (1) and (5)  
32 MCA is alleged. Tom Gigstad, MEA-MFT Field Consultant filed the charge on behalf of  
33 the Association. Tony Koenig, attorney at law, with the Montana School Boards  
34 Association, has appeared on behalf of the District and has answered the complaint  
35 denying that the District violated Montana law.  
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38 John Andrew was assigned by the Board to investigate the charge and has reviewed  
39 the information submitted by the parties and communicated with them as necessary in  
40 the course of the investigation.  
41  
42

43 **II. Findings and Discussion**

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45 The ACEA and the District are in the process of negotiating a successor contract to the  
46 first ever contract between the parties, the duration of which was July 1, 2009, through  
47 June 30, 2010. At the heart of the instant dispute is a disagreement over whether or not  
48 the District was under an obligation to increase the insurance contribution made on  
49 behalf of eligible bargaining unit members. The Association contends the District is  
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1 obligated to increase bargaining unit members' contribution to the same as that  
2 negotiated by the District certified staff. The District contends that it is under no such  
3 obligation, but rather, any increase is subject to collective bargaining.  
4

5 As a threshold issue the District contends that the interpretation of contract language in  
6 question is subject to the grievance procedure. That process was not followed and as  
7 such, the complaint should be dismissed.  
8

9  
10 39-31-306 (5) of the Montana Code Annotated provides:

11  
12 An agreement to which a school is a party must contain a grievance procedure  
13 culminating in final and binding arbitration of unresolved and disputed  
14 interpretations of agreements. The aggrieved party may have the grievance or  
15 disputed interpretation of the agreement resolved either by final and binding  
16 arbitration or by any other available legal method and forum, but not by both.  
17 After a grievance has been submitted to arbitration, the grievant and the  
18 exclusive representative waive any right to pursue against the school an action or  
19 complaint that seeks the same remedy. If a grievant or the exclusive  
20 representative files a complaint or other action against the school, arbitration  
21 seeking the same remedy may not be filed or pursued under this section.  
22  
23

24 Although the position of the District is well taken, and although there is a strong  
25 preference on the part of the Board of Personnel Appeals to defer contractual  
26 interpretation disputes to the grievance mechanism of the bargaining agreement, Collyer  
27 Insulated Wire, 192 NLRB 387, 77 LRRM 1931, and William Converse v Anaconda Deer  
28 Lodge County and ULP 44-81 James Forsman v Anaconda Deer Lodge County, August  
29 13, 1982, in the case of school contracts the statute makes it clear that binding  
30 arbitration must be contained in a collective bargaining agreement between a labor  
31 union and a school district, but if the union elects to follow channels other than those in  
32 the grievance procedure it may do so. In the instant case, the Association contends  
33 that the District made a unilateral change in a mandatory subject of bargaining when it  
34 did not follow the collective bargaining agreement by providing the same insurance  
35 contribution to the Association as provided to the certified staff. Put another way, the  
36 parties disagree on what constitutes the status quo under the contract and whether or  
37 not it has been followed by the District. See, for instance ULP 37-81, Forsyth Education  
38 Association, MEA/NEA vs. Rosebud County School District #4 and Montana University  
39 System, and the Labor Relations Bureau, Department of Administration, MT  
40 (1984) and ULP 6-2001, International Union of Operating Engineers, Local 400 vs.  
41 Fergus County. In either instance, it is within the purview of the Board of Personnel  
42 Appeals to decide such questions. The charge cannot be dismissed on the basis of not  
43 following the grievance procedure and/or not filing a grievance in a timely manner under  
44 the contract, with the latter being particularly true since the time for filing an unfair labor  
45 practice is 6 months, 39-31-404 MCA.  
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48  
49 The language in the expired collective bargaining agreement provides:  
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1           Article 7.3, Insurance Benefits

2  
3           The District will provide all employees and their dependents with the same health and  
4           other insurance benefits, including an IRS Section 125 flexible benefit plan, as provided  
5           to teachers under their CBA. The District will contribute \$560/month toward the premium  
6           for insurance coverage for each employee. Those who work less than 20 hours/week  
7           will not receive a contribution. The District contribution for those scheduled to work less  
8           than forty (40) hours/week but at least twenty (20) hours/week shall be prorated against  
9           forty (40) hours.

10  
11          The ACEA contends that this language is clear on its face. In the alternate, if it is not clear, then  
12          parol evidence shows that bargaining between the parties culminated in an agreement that the  
13          classified unit would receive the same insurance benefit as the certified unit as well as the same  
14          premium contribution as received by the certified unit. The Association further contends that in  
15          the last round of bargaining the certified unit received an increase in premium and the  
16          contribution now needs to be increased for the classified unit. Essentially the Association  
17          contends that the status quo in this case is dynamic in that the agreement was meant to provide  
18          that, even during bargaining, or upon expiration of the bargaining agreement, premium  
19          contributions, if increased for the certified unit, would also be increased for the classified unit. In  
20          taking this view the Association points to bargaining history and Association bargaining notes,  
21          past practice of the parties, and a 2008-2009 "Classified Staff Handbook".

22  
23          The District, on the other hand, contends that the language is clear on its face in that it provides  
24          for two distinct things. First, the classified unit will receive the same insurance benefits as the  
25          certified unit. Second, in the view of the District, the language then provides for a contribution  
26          toward the insurance premium amount. The District contends that the amount of the  
27          contribution was set at a specific amount, \$560 with pro-rata benefits for less than full time  
28          employees, and consistent with the District understanding of the agreement, this amount would  
29          stay the same and would change only if bargained between the parties. Further, in the view of  
30          the District, if the District increased the premium contribution amount during bargaining they  
31          would be changing the status quo and, in doing so, would be committing an unfair labor  
32          practice.

33  
34          The argument of the District is well taken by the investigator. There are clearly two distinct parts  
35          to the language in question, one dealing with the nature of the benefit and the other being the  
36          amount of the premium contribution by the employer. Beyond this, nothing in the section  
37          addressing insurance, either expressly or impliedly, provides that classified staff would receive  
38          the same insurance premium contribution as the certified staff on an ongoing basis. Yet, since  
39          bargaining history has been raised, discussion is in order.

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41          As it approached bargaining the initial contract the District reviewed the following language in its  
42          consideration of opening proposals:

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45          **7.4 Insurance** (*Do employees currently receive Insurance benefits?*)

46                A. Retirement

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48                   Continuation of Insurance During Retirement: Retiring employees will be  
49                   allowed to continue participation in District insurance program(s) at their  
50

own expense when such participation is allowed by the carrier(s). These individuals shall make payments directly to the appropriate office.

B. Claims against the District

It is understood that the District's only obligation is to pay such amounts as agreed to herein and no claim shall be made against the School District as a result of a denial of insurance coverage or benefits by an insurance carrier.

**7.5 Insurance Committee**

There shall exist an Insurance Committee composed of two school board members, an administrator, the business manager (clerk), three certified teachers appointed by Association, and one classified staff person appointed by the Association. The committee will meet annually to review the current district insurance plan and make recommendations to the school board and the Association.

**7.6 Contributions**

The Board will contribute the following monthly amounts toward medical insurance for each full time employee (as defined in Article 2.2 A):

2009-10 Year	District	
	Single	\$XXX.xx
	Two Party	\$XXX.xx
	Family	\$XXX.xx

\*The District will pay the above amount or the full premium charged by the insurance carrier, whichever is less.

Based on this language the District clearly approached the first bargaining with an eye toward specifying a distinct premium contribution for classified employees, or, perhaps not even making a premium contribution at all.

The Association, on the other hand, offered language in May reading as follows:

7.3 Insurance Benefits

The District will provide all employees and their dependents with the same health and other insurance benefits, including an IRS Section 125 flexible benefit plan, as provided to teachers under their CBA. The District will contribute 100% of the amount of the premium for individual employee coverage and all but \$50 of the monthly premium for any dependent coverage selected by the employee.

1 In June of 2009, the District responded to the Association proposals in Article 7 as  
2 follows:  
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4 7.2 Mileage Allowance  
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6 Employees required by the district in the course of their work to drive personal vehicles  
7 shall receive a car allowance equal to the current IRS allowance under Montana law.  
8

9 **District Response: Agreed**  
10

11 7.3 Insurance Benefits  
12

13 The District will provide all employees and their dependents with the same health and  
14 other insurance benefits, including an IRS Section 125 flexible benefit plan, as provided  
15 to teachers under their CBA. The District will contribute 100% of the amount of the  
16 premium for individual employee coverage and all but \$50 of the monthly premium for  
17 any dependent coverage selected by the employee.  
18

19 7.4 Retirement Benefits  
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21 The Board will be a participating employer in the Montana Public Employees Retirement  
22 System and all employees will be members of PERS. An employee who retires under  
23 PERS with at least fifteen (15) year of credited service there under will continue to  
24 receive district contributions for health insurance coverage as though an active  
25 employee for the first three years following the effective date of retirement.  
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27 **District Response: No**  
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29 Concerning section 7.3, this written response by the District contains no specific  
30 acceptance or rejection of the Association proposal, but the District contends it did not  
31 agree with the section as offered by the Association.  
32

33 In a fax from the Association to the District in June of 2009, the following language is  
34 found:  
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36 Article 7.3, Insurance Benefits  
37

38 The District will provide all employees and their dependents with the same health  
39 and other insurance benefits, including an IRS Section 125 flexible benefit plan,  
40 as provided to teachers under their CBA. The District will contribute \$560/month  
41 toward the premium for insurance coverage for each employee who works twenty  
42 (20) hours or more per week. Those who work less than 20 hours/week will not  
43 receive a contribution.  
44

45 In addition to language proposals, and by way of further discussion, the Association  
46 points the investigator to the fact that in the course of bargaining the initial contract the  
47 District increased the premium amount from \$490/month to \$560/month. The  
48 Association asserts this was consistent with existing practice to tie classified premium  
49 contribution to certified premium contributions. As further evidence of this the  
50 Association points to the "Classified Staff Handbook". The section of the handbook

1 offered by the Association references the District making a “maximum full contribution”  
2 toward premium to all eligible employees, with that amount being \$490/month in the  
3 handbook at that time. This language was interpreted to mean, and was applied to  
4 mean, that when the certified staff received an increase in insurance premium  
5 contribution, so too did all eligible classified employees. Since the handbook applied to  
6 all eligible classified employees, including those in the newly created bargaining unit, it  
7 was entirely possible that the status quo at the time of the first negotiations was to  
8 increase the premium contribution to all classified employees, including those in the  
9 newly formed bargaining unit. If the employer had not increased the contribution,  
10 arguably they would have committed an unfair labor practice. See, ULP 6-2001, supra.  
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12  
13 In the information made available to the investigator there is no indication that the  
14 District intended to pay the same premium contribution to the certified bargaining unit as  
15 to the classified bargaining unit in any sort of ongoing basis, nor did the District ever  
16 intend to pay 100% of the premium amount to classified bargaining unit members. At  
17 best, if either intent existed, it was before the Association was on the scene and then  
18 continued for the duration of the initial bargaining agreement, and then for arguably  
19 good reasons. It is equally clear that the Association varied its proposals over time  
20 from 100% of the premium to a specific dollar amount contribution. Nowhere is there  
21 anything, either in the section of the bargaining agreement pertaining to insurance  
22 benefit/contribution, or elsewhere in the collective bargaining agreement that says the  
23 contribution, whatever its amount, was subject to automatic increase or decrease during  
24 the life of the agreement or post expiration. If it were understood and intended by the  
25 parties that the Association would receive the same contribution amount as the certified  
26 staff, either during the life of the bargaining agreement, or upon contract expiration that  
27 should be stated in the collective bargaining agreement. It is not, and it could as easily  
28 be said that any “me too” discussions were good only for the initial contract between the  
29 parties as it would be to say that such an understanding would carry forth in perpetuity.  
30 The language of the bargaining agreement supports the first reading rather than the  
31 second.  
32  
33

34  
35 Having reviewed the contractual language, and in full consideration of the arguments  
36 and information submitted by the parties, it is the view of the investigator that the  
37 language in the collective bargaining agreement, as well as the actions of the District,  
38 are consistent with the position of the District. There is insufficient evidence to warrant  
39 a finding of probable merit.  
40

### 41 **III. Recommended Order**

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43 It is hereby recommended that Unfair Labor Practice Charge 11-2011 be dismissed.  
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45 DATED this 2<sup>nd</sup> day of March of 2011.  
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BOARD OF PERSONNEL APPEALS

By: \_\_\_\_\_  
John Andrew  
Investigator

NOTICE

Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss may be appealed to the Board. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to dismiss becomes a final order of the Board.

\* \* \* \* \*

CERTIFICATE OF MAILING

I, \_\_\_\_\_, do hereby certify that a true and correct copy of this document was mailed to the following on the 11<sup>th</sup> day of March 2011, postage paid and addressed as follows:

TONY KOENIG  
MONTANA SCHOOL BOARDS ASSOCIATION  
863 GREAT NORTHERN BLVD STE 301  
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TOM GIGSTAD FIELD CONSULTANT  
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